

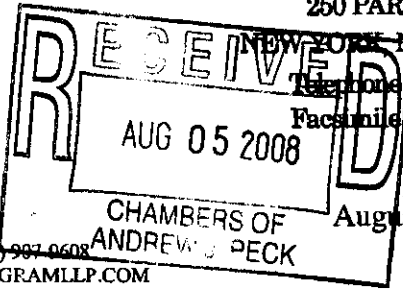
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August 5, 2008

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BY FACSIMILE

Hon. Andrew J. Peck, U.S.M.J.
United States District Court for the
Southern District of New York
500 Pearl Street
New York, NY 10007

MEMO ENDORSED *p2*

**Re: William A. Gross Construction Associates, Inc. v.
American Manufacturers Mutual Insurance Company,
and successive impleader actions
07-CV-10639 (LAK)(AJP)**

Dear Judge Peck:

On behalf of third-party defendant/fourth-party plaintiff, Cauldwell Wingate, I am writing to object to the reply brief of fourth-party defendant/fifth-party plaintiff DASNY, because it relies on a completely new jurisdictional basis for the dismissal of Cauldwell Wingate's fourth-party complaint.

Invoking 28 U.S.C. § 1367(c), DASNY moved to dismiss based on the alleged absence of supplemental jurisdiction over the fourth-party action. (*See, e.g.,* DASNY Notice of Motion dated June 13, 2008 and DASNY moving Memorandum of Law at 2 *et seq.*) We accordingly addressed our responsive legal arguments to § 1367(c), as well as to DASNY's alternative argument that the fourth-party action be severed or tried separately.

In its reply -- for the first time ever -- DASNY invokes Rule 19 and § 1359, and urges that "the first-party complaint must be dismissed for lack of jurisdiction," (DASNY Reply Br. at 11), allegedly for failure to join an indispensable party. While that argument, as DASNY itself acknowledges, affects first-party plaintiff Gross, DASNY did not move to dismiss Gross's complaint, or provide any notice to Gross that it would seek to do so.

And, in any event, since DASNY did not raise the indispensable party issue in its original submission, we also did not address it. While DASNY argues that "a challenge to subject matter may be raised at any time," (*id.* at 12), that does not mean it may be raised without the opportunity for a response. Accordingly, we respectfully request that the Court not consider DASNY's argument based on the indispensable party issue. *See, e.g., Fleet Capital Corp. v.*

The Honorable Andrew J. Peck
August 5, 2008
Page 2

Yamaha Motor Corp., U.S.A., No. 01 Civ. 1047 (AJP), 2002 WL 31174470 (S.D.N.Y. 2002)
(citing *Playboy Enterprises, Inc. v. Dumas*, 960 F.Supp. 710, 720, n.7 (S.D.N.Y. 1997)).

Should the Court determine that it will consider DASNY's new jurisdictional argument, we respectfully request the opportunity to submit a sur-reply on that issue.

I have addressed this letter to the Court, because it is my understanding that Judge Kaplan has referred DASNY's motion to Your Honor for report and recommendation. I am submitting a courtesy copy to Judge Kaplan as well.

Respectfully,




Patricia Hewitt

cc: Hon. Lewis A. Kaplan (by hand)
(by facsimile):
Carol A. Sigmond, Esq.
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MEMO ENDORSED

8/6/08
Carol Sigmond - small as
before, Gross - day after party
not works to - as to up to
DASNY's new up buy argument, 8/15.
(The Court wonders why DASNY did not
ask this argument in its original motion
Pages!)

SO ORDERED


Hon. Andrew Jay Peck
United States Magistrate Judge

arg for! All kind
Dec 2008

BY FAX

FAX TRANSMITTAL SHEET

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Dated: August 6, 2008

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TRANSCRIPTION:

MEMO ENDORSED 8/6/08

Cauldwell Wingate – as well as American, Gross and any other party that wishes to – are to reply to DASNY's new reply brief arguments, by 8/15. (The Court wonders why DASNY did not raise this argument in its original motion papers!)

Copy to: Judge Lewis A. Kaplan